Supreme Court, U.S.
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In The

Supreme Court of the United States
OCTOBER TERM, 1996

LLOYD EDWIN HUMPHREYS,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI OR CORAM NOBIS TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REV. LLOYD E. HUMPHREYS, M.T.S., J.D.
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Petitioner - Pro Se

42 pp

Petitioner, Lloyd E. Humphreys, seeks a Writ of Certiorari or Coram Nobis to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on May 7, 1996, affirming the judgment of the U. S. District Court for the Northern District of Iowa denying Humphreys's post-conviction relief pursuant to 28 USC §2255 without an evidentiary hearing, and denying Humphreys's Petition for Rehearing and Suggestion for Rehearing en banc in a divided decision on August 8, 1996.

QUESTIONS PRESENTED

1. Did the Eighth Circuit Court of Appeals err in denying Humphreys's post-conviction relief without an evidentiary hearing due to ineffective assistance of counsel on the basis that his trial counsel waived or "defaulted" his right to present witnesses in his defense and to have a jury trial and "unanimous" verdict in which a convicted felon sat as a juror, and returned a verdict, all without an evidentiary hearing at the District Court and no oral argument at the Appellate level?

2. Did the Eighth Circuit Court of Appeals err in this post-conviction relief proceeding by not placing the burden of proof on the prosecution to show that the error of a convicted felon unqualified juror serving and "voting as" a part of the "unanimous" verdict causing defense counsel who discovered the disqualification during trial to anticipate a new trial being granted and therefore not presenting any one of

the defense witnesses did not "cause" a denial of the accused's right and "prejudice" his case.

3. Did the Eighth Circuit Court of Appeals err in not following the decisions of this Court in *U.S. v. Frady*, 456 U.S. 152 (1982), *O'Neal v. McAninch*, 115 S.Ct. 992 (Ohio 1975) and *Ashe v. Swenson*, 397 U.S. 436 (1970) in conflict with other Circuits?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are the Petitioner, Reverend Lloyd E. Humphreys, M.T.S., J.D., and the United States of America.

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PETITION FOR WRIT OF CERTIORARI AND CORAM NOBIS TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Rev. Lloyd E. Humphreys, respectfully prays that a Writ of Certiorari or Coram Nobis issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The original opinion of the Court of Appeals for the Eighth Circuit, dated May 7, 1996 (unpublished), is reprinted in the appendix at, p. 2a, *infra.*

The divided en banc opinion of the Court of Appeals for the Eighth Circuit denying Suggestions for Rehearing En Banc and Rehearing, decided August 8, 1996 (unpublished), is reprinted in the appendix hereto, p. 1a, *infra*. (Court of Appeals Judge David Hansen took no part in the consideration or decision of this case because he was the trial judge.)

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This Court also has original jurisdiction for this relief pursuant to 28 U.S.C. 2241 (A); and the All Writs Statute, 28 U.S.C. 1651 grants jurisdiction for granting Writ of Coram Nobis for fundamental Constitutional errors.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment, United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment, United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On or about August 15, 1990, a criminal indictment was returned against Lloyd Edwin Humphreys, an attorney since 1962, for evading a "substantial" part of his income tax on tax returns prepared by certified public accountants. A jury trial was held for eleven (11) days leading to a conviction for a total tax due over a five-year period of $23,325. Midway through the trial the defense attorney learned that a convicted felon was sitting on the jury. He did not tell the Defendant Petitioner, but did not call any one of the twenty-two (22) witnesses on the Defendant's witness list, including experts and C.P.A. tax preparers listed because he expected a new trial to be granted.

A Motion for New Trial was filed on October 15, 1991, on the basis of a convicted felon unqualified person serving on the jury. The Motion filed by counsel did not claim bias or prejudice but solely disqualification. The Motion for New Trial was overruled because the trial court found that the

attorney for the Defendant, Lloyd E. Humphreys, a former officer in the Judge Advocate General Corps in the United States Army, could not carry the burden of proof to show prejudice or bias as the result of the convicted felon discharged from the military under other than honorable circumstances serving on the jury.

Trial counsel did not bring to the attention of the Court nor to the accused Petitioner Lloyd E. Humphreys that he had ascertained that the convicted felon was serving on the jury during the trial and therefore had not called any of the defense witnesses or experts. Defense counsel did not voir dire or challenge the unqualified juror during trial.

Appellate counsel, an attorney other than trial counsel who had not called the witnesses and held back information from the Court and the accused as to the convicted felon serving on the jury, did not raise the issue of ineffective assistance of counsel, failure of a unanimous verdict due to an unqualified juror voting, nor the failure to call defense witnesses by trial counsel on direct appeal. The United States Court for the Eighth Circuit, on direct appeal, with Judge David Hansen not participating because he had been the trial judge, held that Humphreys's trial attorney, "having failed to diligently and timely discover the relevant information is precluded from being heard on the issue of juror disqualification." *United States v. Humphreys*, 982 F.2d 254, 266 (8th Cir. 1992).

On direct appeal it was ruled that criminal defense trial counsel,

> "subsequent to the entry of a verdict discovered that a juror's (convicted felon, other than honorably discharged from military) had not been restored. Humphreys then brought a motion for a new trial claiming statutory disqualification of the juror (emphasis and parentheses added). . . . It is the defendant's duty to investigate, to question, and to assert a challenge prior to the return of the verdict (emphasis is Court's). . . . A challenge after the verdict comes too late. (*McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 598, 556 (1984)" (Civil Case) (*Infra* Ap. 1c).

Humphreys filed a pro se, post-conviction relief petition to vacate, set aside and correct sentence because conviction was obtained in violation of the Constitution by denial of effective assistance of counsel for other reasons including not presenting a defense, and failing to call over twenty (20) witnesses, including office manager, tax preparers and experts, because he had learned **during trial** that the convicted felon's rights had not been restored, and "defaulting" fundamental rights under the 5th and 6th Amendments. Defense counsel did not present a defense or make objections because he believed the verdict would be void and a new trial granted. Additional grounds were also shown, including shifting the burden of proof to the defendant and failure to have a unanimous untainted verdict due to the unqualified felon juror.

The trial court with a different judge ruling due to the trial judge, The Honorable David Hansen, being appointed to the Eighth Circuit Court of Appeals, summarily dismissed the 2255 motion without notice, discovery, or evidentiary hearing, and made no findings of fact or conclusions of law.

Appeal of the dismissal without evidentiary hearing, findings, or conclusions of the 2255 motion was taken. The Circuit Court panel decided on May 7, 1996:

> "Some of the grounds asserted in Humphreys's motion were resolved against him on direct appeal and cannot be relitigated here. Other grounds asserted could have been raised at trial, or on direct appeal, but were not, and are thus procedurally defaulted. We reject Humphreys's assertion of ineffective assistance of counsel, both as an independent ground and as an excuse for default." (Infra AP 2b)

A motion for rehearing by the panel and suggestion for en banc rehearing was timely filed. On August 8, 1996, a divided en banc Court denied rehearing en banc. Circuit Court Judge Hansen took no part in the hearing because he had been the trial judge.

Statement of the Facts

Lloyd Edwin Humphreys, Juris Doctorate cum laude 1962, had been an all-star on two Rose Bowl and one National Championship football teams. He had been awarded the Outstanding Athlete-Scholar Award and was president of his college graduating class, Lettermen's Club, and O.D.K. He served on the law review, won moot court debate and served as the Dean's research assistance. He had practiced law for twenty-nine years and had been honored as president of his local and national alumni councils, president of the Sigma Chi Trustees, a board certified specialist (civil), and fellow in the Iowa Academy of Trial Lawyers (invitation only). He had been the youngest chairman of a state bar

committee, and received local, state, and national distinguished service awards. He had been a regular army officer in the Judge Advocate General Corps, and volunteered to be the first defense counsel in Vietnam (1965). He was active in politics, and while being considered to run for Congress in 1984, found the I.R.S. investigating him.

Twelve armed I.R.S. agents raided the professional corporation law firm with which Humphreys was associated in 1987, and seized records and computers. They kept the computers ten (10) days beyond the scope of the search warrant. Later, they testified his records were complete and "quite good."

That the raid on the law office was done without the advance permission required by 42 U.S.C. 2000 d (11), and U.S. Dept. of Justice, Tax Division Memorandum No. 52, the affidavit by the sole I.R.S. agent upon which the warrant was issued did not allege any crime or wrongdoing. Trial counsel did not object to seized evidence offered at trial. It was on this issue trial Judge Hansen found probable cause for meritorious appeal to allow an appellate bond to be posted.

Shortly before the Statute of Limitations expired, in August 1991, criminal charges were filed for tax evasion. There was no civil audit at any time, no assessment, nor claims of taxes owing. The first notice of taxes claimed was when the indictment was filed. The taxes were immediately paid in full under protest before trial.

Humphreys moved to Texas the year after the I.R.S. raid on the professional corporation offices. He has resided there

throughout these proceedings except for time served in Federal Labor Camp. The I.R.S. and the prosecutor, ignoring the venue statutes and their own regulations, filed and tried the case in Iowa.

The crimes charged involved less than five (5%) percent of Humphreys's income on tax returns prepared by C.P.A.'s, with records kept by the professional corporation employees. They did not meet the guidelines of the Department of Justice for prosecution so income was moved from one year to another (1984 to 1985), "barter" income included (this on a joint venture that actually had a net operation loss), and money paid to clients was attributed to Humphreys (Wieland, and escrow interest) to elevate the amounts to a total alleged for which he was convicted of twenty-three thousand three hundred twenty-five dollars ($23,325) total tax owing over a five (5) year period ($4,665.05 average per year).

Humphreys asked to personally be co-counsel to participate in trial. The Court overruled his request and advised him he could abandon his defense counsel and try the case pro se but not participate as co-counsel. Humphreys, after twenty-nine years of representing others, could not represent himself as part of the defense team.

At the trial a juror said he had been convicted of a crime and the trial judge advised him his rights must have been restored or he wouldn't have been selected on the panel. The felon juror had filed a questionnaire with the clerk listing his conviction but under local court rule the questionnaires were not allowed to be given to the defense. No voir dire was directed to the felon juror!

Twenty-two (22) witnesses were identified on the Defendant's witness list to be called at trial. They included the professional corporation office manager, tax preparers, experts retained for trial (defense counsel had advised, "This is the kind of case you can't win without an expert"), and fact witnesses showing no tax was due. **Not one (1) of these witnesses were called to testify on the Defendant's case by defense counsel.**

Defense counsel for Humphreys was from Texas where a felon juror participating in a criminal trial would lead to a "void verdict" and the granting of a new trial. Defense counsel learned halfway through the trial the felon juror had been voting illegally, had not received an honorable discharge from the military, and had not been pardoned or had his rights restored. He did not advise Humphreys or the Court of this at that time, or at any time until after verdict and trial.

Defense counsel had been retained for a flat fee for trial of one hundred fifty thousand dollars ($150,000.00). He rested Humphreys's case without calling the defense witnesses. He did not object to improper comments by the prosecutor or misleading, or excludable evidence. One expert witness who had sat through the entire trial on an hourly fee was not called to testify. Fact and other witnesses that were excluded from trial under the "witness rule" were not called to testify. Various documents were not offered into evidence. The only evidence of receipt of most income alleged was a stipulation that the professional corporation had received it--not Humphreys, to avoid prolonging the trial by calling various witnesses.

Defense counsel then filed a motion for new trial without disclosing that during trial and before verdict he had knowledge of the felon juror being discharged under other than honorable circumstances, not being pardoned or having his rights restored, and voting illegally. Trial Court believed this knowledge was gained in the first instance after trial. It was not! It was learned during trial and before Defendant's case and intentionally not brought to the attention of Humphreys or the Court.

The trial Court then placed the burden of proof of bias or prejudice on the defense for the motion for new trial, based on the civil standard of bias or prejudice for new trial at that time (1991). Trial counsel did not go into the discharge under other than honorable conditions of the felon juror and Humphreys's record as a regular Army officer in the Judge Advocate General Corps. He did not bring to the attention of the Court that none of the defense witnesses were called to testify because he believed the verdict would be void and a new trial granted, nor that he had not objected to evidence or prosecutorial comments for that same reason. He did not advise the Court that he could have used an exonerating polygraph exam showing Humphreys's innocence, nor that fact witnesses would evidence no tax owing; and Humphreys's **"actual innocence."**

REASONS FOR GRANTING WRITS

I

AN ATTORNEY CANNOT "WAIVE" OR "DEFAULT" AN ACCUSED'S BASIC

FUNDAMENTAL CONSTITUTIONAL RIGHTS AND COLLATERAL ESTOPPEL PROHIBITS A DEFAULTING AND INEFFECTIVE TRIAL AND APPELLATE ATTORNEY FROM "DEFAULTING" A PERSON'S CONSTITUTIONAL RIGHTS FROM CONSIDERATION IN POST-CONVICTION RELIEF PROCEEDINGS.

The Sixth Amendment to our United States Constitution guarantees: (1) the right to the effective assistance of trial counsel, (2) the right to a fair jury of "qualified" peers who have the legal authority to qualify to vote for a unanimous verdict, and (3) the compulsory process clause which guarantees the right to the Defendant to counsel, and present witnesses in his defense. A criminal defense attorney does not have the right or authority under the law to "waive" or "default" these personal rights of the accused. *Johnson v. Zerbst*, 304 U.S. 458, 466 (1938) ("There can be no waiver of a fundamental Constitutional right."); *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) ("The Sixth Amendment grants to the accused personally the right to make his defense.") Any such "default" or "waiver" denies the accused his "day in court" and the protection of the due process of law guaranteed in the Fifth Amendment to our Constitution and would be ineffective assistance of counsel under the Sixth Amendment. Our case does not accord with the decisions of this court! These fundamental rights have been denied Hunphreys! The Eighth Circuit agrees they have been denied but claims his trial defense counsel, or appellate counsel waived or defaulted them. This counsel cannot do! Further, to do so would be ineffective assistance!

In our case the defense attorney having been paid a flat fee of $150,000 for trial had a conflict of interest with the Defendant in the length and determination of the presentation of a defense. His stipulation, Exh. 1501, that the professional corporation with which Humphreys was associated had received certain fees to avoid calling witnesses manifests his concern for shortening the trial. He believed that the felon juror would lead to a void verdict and require a new trial. His motion for new trial did not even claim bias or prejudice on the part of the unqualified juror. (*Infra* at __) This was in keeping with the law of Texas. See *Matter of Humphreys*, 880 S.W.2d 402, 405 (Texas 1994) ("Humphreys is correct that a conviction by a Texas criminal court under the circumstances he alleges would be void." p. 405); *Tweedle v. State* 218 S.W.2d 846, 848 ("A jury composed of twelve men, one of whom falls within the disqualification mentioned, would not constitute a legal jury, and their verdict would not be binding on the Defendant nor would a court be authorized to enter a judgment of conviction thereon.") (Apparently venue was important!) Accordingly, he cut the defense short and did not call any of the defense witnesses of the twenty-two (22) on the witness list filed with the Court. He would lose money to stay in trial another two (2) weeks and besides, the case would have to be tried again--or so he thought. Iowa and the Eighth Circuit looked to the civil law and required bias be proved by the Defendant before a new trial would be granted.

On direct appeal the government argued to the Circuit Court held that the defense counsel had "defaulted" or waived the unqualified felon juror participation. They did not comment on the lack of unanimity of the verdict because one

juror was not qualified to vote under the law. That issue was not presented by appellate counsel.[1]

The trial Court and the Circuit Court on direct appeal believed that the trial counsel did not discover that the felon had been illegally voting, was not honorably discharged from the military, and had not been pardoned or had his rights restored until after the verdict. In fact, the new evidence on which the 2255 motion was in part based, showed defense counsel discovered that during the trial but did not disclose it to the accused or the Court until after the verdict, and then claimed it was only discovered "subsequent" to trial. It was known before verdict by counsel but not the accused.

Everyone is in agreement that a motion by defense counsel during trial would have unseated the felon juror before his unqualified verdict vote and possibly led to a new trial. Instead, not wanting to reveal the full defense before

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[1]The issue of improper jury venire selection allowing an admittedly unqualified juror on the venire although his questionnaire confessed that and limiting that information only to the government, not the defendant, and the "void verdict" no unanimity issues were also not raised until the 2255 motion as a part of the ineffectiveness of counsel. The Supreme Court has consistently recognized the Defendant's right to a unanimous verdict. (*Andres v. U.S.*, 333 U.S. 740, 748 (1948, (Fed. R. Crim. P. 31(a) "The verdict chall be unanimous."); *Johnson v. Louisiana*, 406 US. 356, 369 (1972). If one juror is unqualified to vote, how can it be a unanimous verdict of twelve without a Defendant's personal and knowing waiver?

the second trial, the defense trial attorney withheld the motion, did not inform the accused or the Court and unilaterally decided not to put on the full defense at what he believed would be a void verdict, requiring a new trial.

The decisions on direct appeal and the 2255 motion appeal by the Eighth Circuit Court do not deal with the merits, or fundamental Constitutional issues, instead they claim defense trial counsel, and defense appellate counsel "defaulted" or waived the Defendant's rights. Those decisions should confirm the 2255 ineffective assistance of counsel claims--the issue is precluded! Counsel didn't do what he should have done. What the accused had a fundamental right to under our law.

The direct appeal decision finds serious fault with defense counsel:

> "It is the Defendant's duty to investigate, to question, and to assert a challenge prior to the return of a verdict. . . . It is incumbent on the Defendant to clearly demonstrate that the juror's lack of qualifications . . . Humphreys did not pursue any questioning of the juror on voir dire. Nor did he further investigate or raise any challenge during trial. Having failed to diligently and timely discover the relevant information, he is precluded from being heard on the issue of juror disqualification." (*Infra* Ap 2c)

Are these not findings and conclusions of law that Humphreys's trial counsel and appellate counsel were ineffective!? Isn't this in the nature of collateral estoppel or issue preclusion? How can the Circuit Court find these gross

deficiencies in counsel's "should have done" but didn't conduct and allow a summary dismissal without evidentiary hearing without any findings by the District Court to stand??

In *Ashe v. Swenson*, 397 US 436 (1970) "collateral estoppel" was held to be applied to a Defendant on any factual issue in a criminal case and the Government could not force him to prove it all over again in a second criminal case. Only two conditions are requisite: (1) the same parties are involved, and (2) the issue was already determined by a valid final judgment. Both exist here and the Government and Circuit Court should be bound in the 2255 proceeding by their direct appeal judgments holding defense counsel's "defaults" and failures.

The Government criticism on direct appeal is also tantamount to confessions or admissions against interest (now) of defense counsel's ineffectiveness--he didn't "preserve the severance issue." He didn't "preserve the venue issue." He didn't "ask any voir dire questions on the matter and Defendant did not seek to challenge (felon juror)." He didn't "raise an objection to . . . instruction 8 . . . (and) no objections to instructions 5, 6, 7, or 22" (See Government Brief Excerpts from Direct Appeal, *infra* Ap 2d), and "in his motion for new trial in the Court below, there was no claim made that Mr. Heskett (felon juror) was biased against defendant." (Id. Ap 3d) This last failure to include a claim of bias in the Motion for New Trial evidences defense counsel's belief that disqualification was enough without bias. That in itself should be ineffective assistance under the trial court's and Circuit Court's rulings.

In fact, the government's direct appeal comment on the discovery of the tainted verdict and the felon jurors disqualification is more appropriate than it thought. "Indeed,

it is inexplicable why Defendant made no inquiries during the two-week trial, but evidently inquired only two days after his conviction." (*Infra* Ap 3d). We know now--defense counsel did not make those inquiries. Then he hid the disqualification and looked forward to a second fee for a new trial, and "defaulted" Humphreys's rights, cutting short the trial by not calling any of the 22 defense witnesses.

The cause of these defaults was defense trial counsel's actions and inaction. His malfeasance and nonfeasance. They affected and prejudiced the verdict of this jury by "defaulting" or waiving the accused's rights. The jury should have been entitled to hear the testimony of those twenty-two defense witnesses. This particularly constituted jury would not have returned a verdict at all, let alone one of guilty, but for the ineffectiveness of counsel! A challenge to the unqualified felon juror during trial would have led to his removal, thus it would not have been the same jury that voted on the verdict. The verdict that convicted Humphreys would not have been but for counsel's failures to challenge it at trial.

I pray this Honorable Court in its supervisory capacity or its original writ jurisdiction, if not its certiorari discretion, will honor the findings and assertions of the Circuit Court and government counsel as to the material "defaults" in the accused's case caused by ineffective assistance of counsel and vacate the sentence as violative of the United States Constitution.

II

THE HOLDING IN THE CASE OF *O'NEAL V. MCANINCH*, 115 S.CT. 992, 994-999 (OHIO, 1995) REQUIRING THE BURDEN OF PROOF

THAT ERROR WAS NOT PREJUDICIAL TO DEFENDANT SHOULD BE PLACED ON THE PROSECUTION IN PETITIONS FOR WRIT OF HABEAS CORPUS "ASSURING" THAT TRIALS ARE FUNDAMENTALLY FAIR" (993) AND THAT DOUBTS THAT SHOULD BE RESOLVED IN FAVOR OF A PETITIONER FOR WRIT OF HABEAS CORPUS (994) SHOULD ALSO BE APPLIED TO PETITIONERS FOR POST-CONVICTION RELIEF PURSUANT TO 28 U.S.C. § 2255.

The Eighth Circuit imposed the civil case standard of review in this and other criminal cases for post-conviction relief, in the nature of habeas corpus requiring the accused Petitioner to carry the ultimate burden of proof and risk of nonpersuasion on all of the issues in this case, rather than a shifting prima facie basis of going forward initially[2] or the government bearing the burden throughout pursuant to *Chapman v. California*, 386 U.S. 18, 24-26 (1967) that the violation of a Defendant's rights did not contribute to their conviction. They have not accorded with the philosophy this Court has articulated.

Both trial counsel's and appellate counsel's positions on the unqualified jury no unanimous void verdict issues placed the burden on the Defendant to show bias or prejudice rather than the government to show harmlessness or that the jury was qualified and the verdict that the violation of a

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[2]*E.g.*, The fair cross-section requirement for a jury requires a shifting burden of proof. *Duren v. Missouri*, 439 U.S. 357 (1979). Why not the unanimity disqualification juror issue?

Defendant's rights did not contribute to their conviction met with Constitutional muster with one unqualified felon juror participating and no unanimity of twelve (12) qualified voting jurors (an impossible task). The verdict should be void due to illegality, not necessarily bias.

This should also be considered a "death penalty" case! The profession of the law for me has been killed. The new Uniform Bar Codes which are in effect in Texas prohibit reinstatement for five (5) years after sentence, which includes probation. Considering the appellate process that prohibits practicing law in this case from November 1991 until 2002 (ages 53 to 64). Reputation has also received a "death penalty" blow. The "Man of the Year" Award received from the Eglin Federal Prison Camp inmates and ordination as an Episcopal minister does not restore the reputation lost by this "void" conviction. The "actual innocence" standard from death cases would seem to be appropriate.

The recent case of *O'Neal v. McAninch*, (115 S.Ct. 992, 994-999 (Ohio) 1995) also must be considered on this issue that was a habeas corpus proceeding but 2255 post-conviction review is "akin to it." There the burden of proving the error was not prejudicially placed on the Defendant but instead was placed on the prosecution. The Supreme Court was concerned with "assuring that trials are fundamentally fair" (p. 993) and that doubts should be resolved in favor of the post-conviction relief Petitioner (p. 994). They expressly state:

> "In cases of grave doubt as to harmlessness, the Petitioner must win." (p. 995)

Here the total and complete denial of a defense by ineffective Trial Counsel not calling any expert or lay witnesses,

although twenty-two (22) were identified; as well as the failure to bring to the attention of the Court during trial that an unqualified juror--a convicted felon--was on the jury, deprived the Petitioner of his day in court, and a legitimate jury verdict. Under *O'Neal*, the burden to show this was harmless and not prejudicial, would be on the Government, not the Defendant. That is true in our case as well!

The U.S. Supreme Court in *O'Neal* states at page 996:

> "If the error is not 'technical,' if instead, the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, then the burden of sustaining a verdict will . . . rest upon the one claiming it."

Here the accused was deprived of a defense by his ineffective counsel. It was "substantial," not "technical."

They then conclude at p. 997,

> "In the long run there would be a closer guard against error at the trial, if . . . courts were alert to reverse, in case of doubt, for error that could have contaminated the judgment." (emphasis added)

This entire issue has been misconstrued by the trial and Eighth Circuit Courts. It is a question of extreme significance. An ineffective attorney should not be able to waive or "default" basic Constitutional rights to the prejudice of a litigant, especially one who is "actually innocent." And the burden of proof on the faulty defective jury should have

been on the government on the 2255 motion and on direct appeal. This *O'Neal* U.S. Supreme Court decision clarifies the law in this area and requires our case to be brought into line with it. It illustrates the ineffectiveness of both trial and appellate counsel in not properly presenting this issue. It also modifies or clarifies the law so that our case where the burden on this issue was placed on the Defendant--our case is clearly contrary to *O'Neal* and the "Law of the Land."

O'Neal requires reversal of the underlying conviction and reversal of the 2255 peremptory decision by the trial court without an evidentiary hearing. A hearing should be granted in which the burden is on the government.

This issue has been misconstrued by the panel decision and creates a holding contrary to the United States Constitution as interpreted by the U.S. Supreme Court.

The appellate counsel was also ineffective, in addition to the trial counsel. How can an appellate attorney "procedurally default" vital issues as found by the Circuit Court without being ineffective? Either there is no "procedural default" or counsel was ineffective. **This issue has been overlooked or misconstrued by the Circuit Court decision.**

There were no further findings or conclusions of law by the substituted judge reviewing the 2255 motion in our case. He summarily dismissed it. The Circuit Court also does not make the requisite findings. The law requires an evidentiary hearing unless the Court finds "conclusively that the Petitioner is not entitled to relief." If the Court finds that the

allegations if true would entitle Petitioner to relief summary dismissal without hearing is improper.

III

THAT THERE IS A CONFLICT IN THE CIRCUIT COURTS OF APPEAL AS TO THE ELEMENTS OF PROOF AND BURDEN OF PROOF REQUIRED IN MOTIONS PURSUANT TO 28 USC 2255 FOR INEFFECTIVE ASSISTANCE OF COUNSEL AND THE EIGHTH CIRCUIT'S POSITION IS CONTRARY TO THE CONSTITUTION AND THIS SUPREME COURT.

The Eighth Circuit Court of Appeals has specifically declined

> "to reach the merits of . . . ineffective assistance of counsel claims on direct appeal. Claims of ineffective assistance of counsel are best raised in a motion for post-conviction relief pursuant to 28 U.S.C. 2255 and we will not consider an ineffective assistance claim on direct appeal. . . ." (*U.S. v. Scott*, 26 F.3d 1458 (8th Cir. 1994)) See also, *U.S. v. Sanclemente-Bejarano*, 861 F.2d 206, 211 (9th 188)

Ineffective assistance of counsel claims must therefore be raised for the first time by a 2255 motion in the Eighth Circuit and not direct appeal. However, the Circuits differ and are in conflict as to what is required then. What is the standard of review and the burden of proof?

Some Circuits require a showing of cause and prejudice by the Petitioner in keeping with *U.S. v. Frady* 456 U.S. 152, 168 (1982). See, e.g., *U.S. v. Tarascio*, 15 F.3d 224, 225 (2nd Cir. 1993); *U.S. v. Biberfeld*, 957 F.2d 98, 104 (3rd Cir. 1992); *U.S. v. Maybeck*, 23 F.3d 888, 891 (4th Cir. 1994); *U.S. v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991--en banc) cert. den. 502 U.S. 1076 (1992); *Ambriz v. U.S.* 14 F.3d 331, 333 (7th Cir. 1994). Others have held that some claims of ineffective counsel can be waived regardless of a showing of cause and prejudice. These are usually non-Constitutional claims (See, e.g., *Brennan v. U.S.* 867 F.2d 111, 120 (2nd Cir.), cert. den. 490 U.S. 1022 (1989); *Anderson v. U.S.*, 25 F.3d 704, 706 (8th Cir. 1994) (failed to raise on direct appeal and could not be excused by showing "cause and prejudice"). That is our case here! *Anderson* is cited for authority for finding the alleged "procedural default" in our case. The Circuit Court does not even consider "cause and prejudice" or "miscarriage of justice." They hold a defense attorney can "default" his client's rights--without consideration of his ineffectiveness.

In other words, the Eighth Circuit, although, requiring ineffective assistance of counsel to be raised on a 2255 motion because they "will not consider an ineffective assistance claim on direct appeal," (*U.S. v. Scott supra*), will also not allow a showing of "cause and prejudice" or "miscarriage of justice" in keeping with *Frady* and progeny to void a waiver--"default" rejection of the 2255 claim. In our case, the Eighth Circuit "defaults" the claims of ineffective assistance not raised on appeal and dismisses the underlying conduct of the ineffectiveness because they were decided or omitted on appeal. A Catch-22 situation! They do not deal with the merits of the ineffectiveness. A prompt way to dispose of such claims but not in keeping with our basic American concepts of fair play--especially when they

expressly require such claims to be held out of direct appeals for 2255 motions filed later. When their directed procedure is filed they find "default" or waiver required because it was brought up after direct appeal.

Some Circuits have even held that in certain circumstances a showing of cause and prejudice is not required when a claim of ineffective assistance of trial counsel is raised for the first time in a 2255 motion (*Ciak v. U.S.*, 59 F.3d 296, 303 (2nd Cir. 1995); *U.S. v. DeRewil*, 10 F.3d 100, 104 (3rd Cir. 1993) cert. den. 114 S.Ct. 1549 (1994); *Castellanos v. U.S.*, 26 F.3d 717 (7th Cir. 1994). These Circuits differ from the Eighth.

Some Circuits have allowed new Constitutional issues to be raised because of additional considerations in contrast to the Eighth Circuit limited restrictive approach. (See, *U.S. v. Dula*, 989 F.2d 772, 775 (5th Cir.) cert. den. 114 S.Ct. 172 (1993); *Sancher v. U.S.*, 50 F.3d 1448, 1453 (9th Cir. 1995); *U.S. v. Pollard*, 959 F.2d 1011, 1018 (D.C. Cir.) cert. den. 113 S.Ct. 322 (1992). These Circuits differ from the Eighth.

None are as restrictively limiting as the Eighth Circuit! This combined with placing the burden of proof for the risk of nonpersuasion exclusively on the accused's shoulders ignoring *O'Neal v. McAninch*, Id. and *Chapman* before it. It is submitted that there should at least be a shifting of the burden of proof to the government once a prima facie showing takes place. In our case that prima facie showing of ineffective assistance of counsel is more than met by the government's position on direct appeal and the Eight Circuit's findings of what trial counsel should have done but didn't.

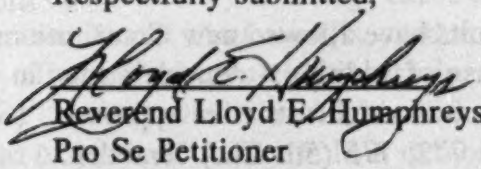
It is difficult to see how in our case any court would not grant the vacating of conviction and sentence or at least grant

an evidentiary hearing with the proper burdens of proof. I have been denied the equal protection of the law and due process basic Constitutional rights! This conviction contains a "fundamental defect" causing a "complete miscarriage of justice."

CONCLUSION

It is prayed for the foregoing reasons that this Petition for Writ of Certorari, or in the alternative Writ of Coram Nobis, be granted.

Respectfully submitted,



Reverend Lloyd E. Humphreys, M.T.S., J.D.
Pro Se Petitioner
P. O. Box 8300-257
Dallas, Texas 75205

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3455NICR

Lloyd E. Humphreys,	*	
	*	
Appellant,	*	
	*	Order Denying Petition
v.	*	for Rehearing and
	*	Suggestion for
	*	Rehearing En Banc
United States of America,	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion. The petition for rehearing by the panel is also denied. Judge Hansen took no part in the consideration or decision of this case.

August 8, 1996

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 95-3455NI

Lloyd E. Humphreys,	*	
	*	
Appellant,	*	Appeal from the United
	*	States District Court for
v.	*	the Northern District of
	*	Iowa.
United States of America,	*	
	*	[UNPUBLISHED]
Appellee.	*	

Submitted: May 2, 1996

Filed: May 7, 1996

Before FAGG, BOWMAN, and BEAM, Circuit Judges,

PER CURIAM.

"A jury found Lloyd E. Humphreys guilty of tax offenses, and we affirmed his conviction. See *United States v. Humphreys*, 982 F.2d 254 (8th Cir. 1992), cert. denied, 114 S. Ct. 61 (1993). Humphreys then filed this 28 U.S.C. § 2255 motion, and the district court denied relief without an evidentiary hearing. Humphreys appeals.

Having carefully reviewed the record, we are convinced that Humphreys is not entitled to § 2255 relief. See *United States v. Duke*, 50 F.3d 571, 576 (8th Cir.) (standard of review), cert. denied, 116 S. Ct. 224 (1995). Some of the grounds asserted in Humphreys's motion were resolved against him on direct appeal and cannot be relitigated here. See *Humphreys*, 982 F.2d at 257-62; *Dall v. United States*, 957 F.2d 571, 572-73 (8th Cir. 1992) (per curiam). Other grounds asserted by Humphreys could have been raised at trial or on direct appeal, but were not, and are thus procedurally defaulted. See *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994); *United States v. Smith*, 843 F.2d 1148, 1149 (8th Cir. 1988) (per curiam). We reject Humphreys's assertion of ineffective assistance of counsel, both as an independent ground and as cause excusing his default. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Reid v. United States*, 976 F.2d 446, 447-48 (8th Cir. 1992), cert. denied, 507 U.S. 945 (1993).

Accordingly, we affirm the judgment of the district court."

APPENDIX C

Pertinent Portions of the Opinion of the United States Eighth Circuit Court of Appeals on Direct Appeal

Pertinent portions of the opinion of the United States Eighth Circuit Court of Appeals on Direct Appeal, dated December 7, 1992, are as follows: (Judge David Hansen did not participate because he had been the trial judge.)

"D. Juror Disqualification

At trial, the court's voir dire questioning revealed that one of the jurors had been convicted thirty-one years earlier on an embezzlement charge. Subsequent to entry of the verdict, Humphreys discovered that the juror's civil rights had not been restored. Humphreys then brought a motion for a new trial, claiming statutory disqualification of the juror. . . . It is abundantly clear from the record that the juror was operating under a good faith belief that he was at all times a qualified juror, and that he did not fear retaliation from the government if he voted for acquittal. . . .

Failure to have one of the juror qualifications set forth at 28 U.S.C. § 1865(b) should not necessarily render an individual fundamentally unfit to serve. Rather, it should serve as a basis for challenge to the person's qualifications.[5] We are in agreement with the recent holding of the District

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[5]See Ford v. United States, 201 F.2d 300 (5th Cir. 1953).

of Columbia Circuit Court of Appeals, in which the court stated:

> The Sixth amendment right to an impartial jury does not require an absolute bar on felon-jurors. The touchstone of the guarantee of an impartial jury is protection against juror bias. A per se rule would be appropriate only if one could reasonably conclude that felons are always biased against one party or another. Congress' purpose in restricting, in 28 U.S.C. 1965-67, jury service by felons seems to stem from considerations other than a concern about biased jurors. More important, a per se rule in this context seems inconsistent with the hostility expressed in *McDonough Power Equipment Inc. v. Greenwood*, 464 U.S. 548 (1984), to unnecessary new trials and to the axiom that a defendant is entitled to a fair trial but not a perfect one. We think, therefore, that the Sixth Amendment does not require automatic reversal of every conviction reached by a jury that included a felon.

United States v. Boney, __ F.2d __ (D.C. Cir. 1992), 1992 WL 267481.

It is the defendant's duty to investigate, to question, and to assert a challenge prior to the return of the verdict. If actual bias or prejudice is revealed, an obvious challenge for cause is timely presented. If not, the court may still determine the necessity of taking remedial action, such as the seating of an alternate juror. In an effort to obtain a new trial, it is incumbent upon the defendant to clearly demonstrate that the juror's lack of qualifications presented actual bias or prejudice, affecting the juror's impartiality and

impacting the fairness of the trial.[6] A challenge after the verdict without such a showing comes too late.[7]

Humphreys's challenge fails in both respects. Humphreys did not pursue any questioning of the juror on voir dire, nor did he further investigate or raise any challenge during trial. Having failed to diligently and timely discover the relevant information, he is precluded from being heard on the issue of juror qualification. At the conclusion of the hearing on Humphreys's motion, the district court specifically found that there was no evidence of either bias or unfairness

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[6]In those cases addressing a challenge for cause based upon bias or prejudice, the Court has stated:

> To obtain a new trial . . . a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of the trial.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984).

[7]See Shotwell Manufacturing Co. v. United States, 371 U.S. 341 (1963), where an objection to the petit jury array brought four years after the verdict was returned was not timely, the relevant information was available before entry of the verdict through due diligence, and no prejudice was shown.

as a result of the seating of this juror. This conclusion is not clearly erroneous and we have no inclination to set it aside. See *United States v. Miscellaneous Firearms & Ammunition*, 945 F.2d 239 (8th Cir. 1991). The court did not abuse its discretion in refusing to grant Humphreys's motion for a new trial.

APPENDIX D
Pertinent Portions of the Government Brief from the Direct Appeal

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. CR 90-9
	)	
vs.	)	
	)	**ORDER**
LLOYD E. HUMPHREYS,	)	
	)	
Defendant.		

The matter before the court is the defendant's motion for relief from judgment. The court notes that the defendant has now appealed this matter to the Eighth Circuit Court of Appeals. In addition, the court finds that there is no merit in the motion for relief from judgment.

IT IS THEREFORE ORDERED that the defendant's motion for relief from judgment is denied.

Done and Ordered this 23rd day of February, 1996.

Pertinent portions of the Government Brief from the Direct Appeal on the performance of defense counsel at trial state:

(A) "Defendant did not preserve the severance issue. . . . In order to preserve a rule in motion on appeal, the motion must be renewed at the close of the evidence. *U.S. v. Sanchez-Lopez*, 879 F2d 541, 551 (9th 1989). Failure to renew the motion results in a waiver of this issue. . . . In the instant case, Defendant did not renew his motion to sever at the close of the Government's case (TR 6, 1356-1358) or at the close of all the evidence (TR 8, 1722-1724). Accordingly he has waived this issue and it should not be reviewed on appeal." (Brief of Appellee, No. 91-3812, U.S. Court of Appeals, Eighth Circuit, pp. 25, 26).

(B) "Defendant did not preserve the venue issue in the Court below . . . and the renewed motions were denied because 'Defendant did not timely invoke any right to transfer under §3237(b). . . . Having failed to preserve this issue in the Court below Defendant cannot raise it here for the first time." (Id. pp. 29, 30)

(C) "In his motion for new trial in the Court below there was no claim made that Mr. Heskett was biased against the Defendant . . . Defendant did not ask any voir dire questions . . . and did not seek to challenge Mr. Heskett for cause based on a claim of bias. Obviously, if Defendant felt that the conviction itself was cause to challenge Mr. Heskett, he would have done so. . . . It is Defendant's duty to discover any lack of qualification during voir dire, or

from some other source and, if there is no showing of actual bias or prejudice, a challenge to a juror's qualifications comes too late if not asserted until after the return of a verdict. . . . Indeed, it is inexplicable why Defendant made no inquiries during the two-week trial, but evidently inquired only two days after his conviction. Just as an objection to the entire petit jury array comes too late after a verdict is returned, especially when the relevant information was available through due diligence before entry of the verdict . . . so too does an objection to an individual juror come too late when raised post-verdict . . . Defendant's claim is too late." (Id. 40-43)

(D) Defendant made no objections to Instructions 5, 6, 7 or 22 in the trial court (TR 9, 1782-1797). He cannot raise issues regarding these instructions for the first time on appeal. . . . He did not object to instructions on this ground in the Court below and cannot raise it for the first time on appeal. (Id. 44-46)